Supreme Court, U.S.
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No. 01-112

IN THE

Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,

Petitioner,

v.

FUJITSU LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Fujitsu Limited, has no parent company and is a publicly traded stock corporation, shares of which are traded on the Tokyo Exchange.

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Warsaw Convention: Convention for the Unification of Certain Rules Relating to International Transportation by Air done at Warsaw, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, T.S. No. 876 (1934) *reprinted in* 49 U.S.C. § 40105 note (1994) ..... *passim*

The Hague Protocol of 1955: Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, done at The Hague, Sept. 28, 1955, 478 U.N.T.S. 371 ..... *passim*

Montreal Protocol No. 4 of 1975: Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed atWarsaw on October 12, 1929, as amended by the Protocol done at The Hague on September 28, 1955, Sept. 25, 1975, TIAS No. __, *reprinted in*, ICAO DOC. NO. 9148 (1975) ..... *passim*

Second International Conference on Private Aeronautical Law Minutes, Warsaw, 1929, (translated by Horner and Legrez), Rothman, 1975 6

COUNTER STATEMENT OF THE CASE

FedEx has filed its petition for Certiorari in its continuing attempt to avail itself of the limitation of liability of the Convention for the Unification of Certain Rules Relating to International Transportation by Air done at Warsaw, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, T.S. No. 876 (1934), reprinted at 49 U.S.C. § 40105 note (1994), known and commonly referred to as the *Warsaw Convention*, for the damage sustained to goods (silicon wafers) during their transportation by air from Austin, Texas to Tokyo, Japan.

The transportation took place in May of 1996. At that time, both the United States and Japan were high contracting parties to the Warsaw Convention.

At that time, Japan was also a signatory to a 1955 amendment to that Convention known as *The Hague Protocol of 1955*. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, done at the Hague, Sept. 28, 1955, 478 U.N.T.S. 371. By ratifying *Montreal Protocol No. 4 of 1975*, Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929, as amended by the Protocol done at The Hague on September 28, 1955, Sept. 25, 1975, TIAS No. ____, reprinted in, ICAO Doc. No. 9148 (1975), the United States also acceded to the Hague Protocol.

No separate airway bill was issued for the transportation by air of the shipment from Austin to Tokyo until the shipment had arrived at the FedEx distribution center in Memphis.

FedEx does not dispute that it carried these goods by air from Austin, Texas to Tokyo, Japan and that this was "international transportation" between two "high contracting parties."

FedEx contends that it could avail itself of the limitation if either: (1) the Courts below characterized the shipment as a "return" or (2) if the Hague Protocol rather than the Warsaw Convention is the controlling law.

The petition should be denied since the result does not change even if FedEx prevails on either or both of these points.

REASONS FOR DENYING THE WRIT

I. Certiorari should be denied because the outcome of this case will not change even if this Court were to accept either or both of petitioner's arguments that the Hague Protocol rather than the Warsaw Convention is the controlling law applicable to this shipment or that the shipment was a "return".

Both the Warsaw Convention and The Hague Protocol provide that for the air carrier to avail itself of the limitation of liability under Article 22(2) in regard to the carriage of goods by air, the shipment must have had an air waybill meeting certain minimum requirements. No "exception" in this regard is found anywhere in either treaty as regards "types" of shipments, such as collect shipments, return shipments or fully prepaid shipments. Nevertheless FedEx asks this Court to engrave on the treaties at least one such exception, i.e., "the return."

With apologies to Gertrude Stein the fact is that under either treaty, "a return is always a carriage of goods by air but every carriage of goods by air is not always a return."

Specifically, in regard to the facts of this case, the applicable provision of Warsaw is Article 9 that provides:

> If the carrier accepts goods without an airway bill having been made out, or if the air waybill does not contain all the particulars set out in article 8(a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

In *Chan v. Korean Airlines, Ltd.*, 490 U.S. 122 (1989), we are instructed that any interpretation of the Convention must begin with the literal language of the treaty. *See Buonocore v. Trans World Airlines, Inc.*, 900 F.2d 8, 9 (2d Cir. 1990).

The "literal language" of Article 9 contains no exceptions. Thus, whether the shipment is characterized as a return or otherwise, absent a timely air waybill with the required particulars, the air carrier, which accepts a shipment to travel between two high contracting parties to Warsaw, can not avail itself of the limitation. Here, FedEx accepted the goods for transportation from Austin to Tokyo upon receipt of written instructions and a written guarantee of payment. There simply was no air waybill.

For those countries adhering to The Hague Protocol, Article VII of the Protocol deleted and replaced the Warsaw language of Article 9 with the following language:

> If, with the consent of the carrier, cargo is loaded on board the aircraft without an air waybill having been made out, or if the air waybill does not include the notice required by Article 8, paragraph (c), the carrier shall not be entitled to avail himself of the provisions of Article 22, paragraph 2.

The "literal language" of the Hague Protocol contains no exceptions. There is no question that the air waybill for the carriage of these goods by air from Austin to Tokyo was not created until the shipment had "with the consent of the carrier," been loaded, left Austin and arrived in Memphis.

Although it is clear that the Second Circuit correctly applied the terms of the Warsaw Convention to this case, it even went on to state in its opinion that:

> We do, however, note our view that FedEx would not prevail even under the terms of the Amended Warsaw Convention. Upon its acceptance of the goods for shipment in Austin, FedEx permitted those goods to be loaded onto the aircraft for shipment without a new air waybill, apparently in violation of the requirements of even the amended version of Article 9.

Fujitsu Limited v. Federal Express Corporation, 247 F.3d 423, 434 (2d Cir. 2000).

Thus, whether this action is controlled by Warsaw, as found by the Courts below, or if it is controlled by the Hague Protocol, as contended by FedEx, the result will be the same. FedEx simply cannot avail itself of the limitation of liability because no air waybill was prepared before the goods left Austin.

FedEx also suggests that this Court should make a finding *de novo* that the shipment was a "return" for which no air waybill was required. Even assuming that this position of FedEx is accepted, the result is the same for the reasons stated. **The "literal language" of both Warsaw and the Hague Protocol contains no such exception.**

Finally FedEx contends that no air waybill for "a return" is required because of Article 12(1) of Warsaw. There is no such exception in Article 12 or anywhere else in the Convention and, as Petitioner notes, this Article was not amended by Hague.

Under Article 12(1), at any time before delivery to the consignee, the consignor can call upon the carrier to make another disposition of the shipment. There are only two caveats; the consignor must not "prejudice" the carrier *and* he (the consignor) must "repay any expenses."

Neither of these caveats either conflicts with nor obviates the requirement of Article 9. The position is further supported by Article 33:

> Nothing contained in this Convention shall prevent the carrier * * * from refusing to enter into any contract of transportation * * *.

Indeed, in presenting Article 12 to the Convention Delegates, Henry De Vos, the Reporter of the International Technical Committee of Aeronautical Legal Exports, wrote:

> However it seemed opportune to remind one at the end of the Convention that all these Provisions left entirely intact the right of all carriers to refuse to accept any carriage whatsoever.[1]

Thus, just as FedEx required both written instructions and a guarantee of payment before it would move the shipment, *if FedEx wanted to avail itself of the limitation of liability under Article 22*, it could have also required a correct air waybill. FedEx also could have refused to move the goods until it had received, or, as it eventually did itself, prepared the air waybill.

II. Certiorari should be denied because there has never been an "abatement" of Warsaw.

Petitioner argues at great length that Warsaw was "abated" before trial by reason of the adoption of Montreal Protocol 4 by which the United States acceded to the Hague Protocol. This position is logically and legally incorrect.

At no point does petitioner put any limitations on its "abatement" theory. Logically, if Warsaw was "abated", does that mean that the United States is no longer a "High Contracting Party" to Warsaw? Are countries that have only signed Warsaw, but not Hague, and which were in a

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1. *Second International Conference on Private Aeronautical Law Minutes, Warsaw, 1929,* (translated by Horner and Legrez), Rothman, 1975 at page 251

treaty relationship with the United States now no longer in such a treaty relationship? Approximately 135 countries ratified or are adherents to the Warsaw Convention. Approximately 50 countries had ratified or adhered to Hague prior to Montreal Protocol 4. Approximately eight countries have signed Hague but not Warsaw. Approximately 51 countries have signed Montreal Protocol 4. There are countries included which have ratified more than one of the documents.

Until March 4, 1999 the United States was in a treaty relationship with each of some 134 other countries. The petitioner now would assert that those "relationships" were "abated." The alternative would be that the United States is now only a "High Contracting Party" to and in treaty relationship only with those 51 countries which themselves have acceded to Hague as amended by Montreal Protocol 4. The bald assertion that Warsaw was "abated" is simply illogical.

Warsaw, the Hague Protocol, and Montreal Protocol 4 all regulate the private rights of air carriers and shippers but only as regards shipments which are between countries which are signatories. Neither the original convention nor either of the amending protocols regulate or affect the relations between any of the signatory nations. There simply is nothing in Hague or Montreal Protocol 4 to suggest that this is the proper result intended by either of these amendments.

Petitioner relies on *Hertz v. Woodman*, 218 U.S. 205 (1910) and *The Schooner Peggy*, 5 U.S. 103 (1801), both of which are inapposite.

In *Hertz*, *supra*, the issue was whether the repeal of an estate tax, passed to fund the Spanish-American War, was prospective or retroactive. No treaty was involved. The Court ultimately held that even though the tax was repealed before the due date, it was fixed and payable.

In *The Schooner Peggy*, the issue was whether a treaty ending a war and containing a provision requiring the return of a prize that had not been "definitively condemned" nullified a proceeding pending on appeal. As Mr. Chief Justice Marshall concluded,

> It is true, that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside.

The Schooner Peggy, *supra*, at page 110.

Since whether or not FedEx is able to avail itself of a limitation of liability in this case does not appear to be of "great national concern," petitioner's principal citation seems to stand for just the opposite proposition than which it was cited.

As suggested by the cited language from the opinion in *The Schooner Peggy*, supra, the appropriate legal authority on this issue in regards to treaties and in accord with *The Schooner Peggy* is *Haver v. Yaker*, 76 U.S. 32 (1869),

where this court succinctly addressed the issue of the retroactivity of a treaty. Two principals were enunciated:

> 1. * * * as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date.
>
> 2. But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it effects them, it is not considered as concluded until there is an exchange of ratifications, * * * *

Haver, supra, at page 34.

The issue here only concerns the private right of FedEx to avail itself of the limitation of liability. Thus, where as here, the Hague Protocol through Montreal Protocol 4 expressly did not "come into force" until well after the shipment in question, the amendments to the treaty are given no retroactive effect as to private rights. *See, e.g.*, 87 C.J.S., Sec. 14, cited in *United States v. City of Kodiak*, 132 F. Supp. 574 (D. Alaska 1955).

As demonstrated, petitioner's theory of "abatement" has no foundation in logic or law.

CONCLUSION

Based on the foregoing, Petitioner has set forth no basis for this court to grant Certiorari.

Respectfully submitted,

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